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JOSEPH F. SPANIOL, JR.
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No. 86-75

In the Supreme Court of the United States

OCTOBER TERM, 1986

THOMAS J. CIAMBRONE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in not declaring a mistrial or discharging a juror after investigating allegedly prejudicial remarks made by that juror.

2. Whether the district court erred in giving a "conscious avoidance" instruction to the jury on the substantive offenses charged in the indictment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2505-2533) is reported at 787 F.2d 799.

JURISDICTION

The judgment of the court of appeals (Pet. App. 2505) was entered on April 4, 1986, and a petition for rehearing was denied on May 22, 1986 (Pet. App. B). The petition for a writ of certiorari was filed on July 21, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to commit extortion and three counts of attempted extortion, in violation of 18 U.S.C. 1951.[1] He was sentenced to concurrent terms of ten years' imprisonment and a fine of $4,000 on each of the four counts.

1. The evidence at trial, the sufficiency of which is not in dispute, is set out in considerable detail in the opinion of the court of appeals (Pet. App. 2507-2521). Petitioner and his brother, Jerry Chambrone, owned and operated a delivery business called T.J. Associates. Chambrone managed the company from its office in New York. Petitioner resided in Florida, but as president of the company, he was in regular contact with the New York office and made major business decisions. In 1982, Computer Sciences Company ("CSC") withdrew certain delivery routes from T.J. Associates and transferred them to Apple Messenger Service ("Apple"), a company operated by Donald Miller. The evidence at trial showed that petitioner participated in an extortion scheme designed to regain those routes for T.J. Associates. Pet. App. 2507-2508.

After petitioner's company lost CSC's delivery business, Jerry Chambrone discussed the situation with Joseph Riggio. He said that Apple president Miller had infiltrated a trucking route under contract to T.J. Associates and asked Riggio to talk to Miller and "make the man understand what he was doing wasn't right" (Pet. App.

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[1] Petitioner was acquitted on three counts of attempted extortion. Co-defendant Jerry A. Chambrone, who was tried with petitioner, was convicted on the conspiracy count and on four counts of attempted extortion. Co-defendent Joseph Vincent Riggio, Jr., pleaded guilty to the conspiracy count and to one count of attempted extortion.

2508). Riggio went to Miller's home on November 20, 1982. Stating that he had been sent by petitioner, Riggio urged Miller to stop doing business with CSC. He compared the trucking business to the garbage business and told Miller that truckers have "area rights" and that "the only way to survive" was to have "respect for each other's work" (*id.* at 2508-2508). Riggio also told Miller that petitioner had "obligations" in New York City and that "certain friends" took a personal interest in petitioner's and Chambrone's business dealings and financial obligations (*id.* at 2509). In addition, Riggio threatened to burn down Miller's house and blow up his car (*id.* at 2508).

Miller responded by telling Riggio that he wanted to speak to petitioner, and Riggio agreed to arrange a meeting. Riggio then told Chambrone about his conversation with Miller. He warned Chambrone that petitioner's upcoming meeting with Miller should be "strictly business" because Miller might tape-record it. Chambrone agreed to relay that information to petitioner (Pet. App. 2509). Two days later, petitioner flew to New Jersey from Florida. On November 23, 1982, petitioner met with Miller at Miller's home. Miller taped the conversation, which was central to the case against petitioner.

Petitioner began the conversation by inquiring whether Miller was tape-recording him (Pet. App. 2510). Miller denied that the conversation was being recorded. Petitioner then stated that his company's contract with CSC was "exclusive" and that CSC did not have the right to do what it was doing. He stated that "all the other messenger services, heavy, heavy messenger services, uh, armored trucks * * * they haven't bothered to touch it [CSC] because they know the situation * * *" (*id.* at 2510-2511). He warned Miller that a ridiculous lawsuit would result from CSC's transfer of the delivery route to Apple and cited to Sacco and Vanzetti as an example of

what could happen in court. He warned Miller that the T.J. Associate drivers were "pissed" and that they were going to take matters into their own hands (*ibid.*).

When Miller told petitioner that he was being threatened, petitioner stated "[n]ot by me you're not" (Pet. App. 2511). Miller said that Riggio claimed to have been sent by petitioner, but petitioner denied that Riggio worked for him. Miller again complained about the threats, stating that Riggio had threatened to burn Miller's house down (*id.* at 2513). Petitioner neither expressed outrage nor stated that he would try to stop Riggio from making or carrying out such threats; rather, he merely stated that he "ha[d] no idea about that" and again denied that he had sent Riggio (*ibid.*). Petitioner further stated: "As far as people coming up to talk to you or do things, I have no idea. [I d]on't wanna' know about it, I don't care to know about it" (*id.* at 2516). Finally, petitioner acknowledged that he was aware that his visit to Miller could cause him problems: "And uh, if it uh, if it comes down, it may be very bad for me for being here. * * * Cause they could say * * * well I came to see you and whatever else is involved" (*id.* at 2517-2518). Petitioner never contacted Riggio, after the conversation with Miller, to find out what Riggio had said to Miller or to determine whether Miller's allegations that he had been threatened were true (*id.* at 2518).

Following petitioner's meeting with Miller, Chambrone made threats to an Apple driver and a CSC employee. In addition, someone began following the car of Brinson Weeks, the CSC employee responsible for transferring the delivery routes to Apple. Six months later, Weeks' car was set on fire as it sat in his apartment parking lot. Later, Chambrone remarked to CSC employees that whoever had firebombed Weeks' car had "only warned him" and that, if he were to do it, he would make sure Weeks was in the car (Pet. App. 2519-2520).

When it became clear that CSC would not voluntarily reverse its decision concerning the delivery routes, Chambrone instructed Riggio to burn one of the Apple driver's cars. Riggio made two unsuccessful attempts to do so. Subsequently, Chambrone told Riggio that Miller "should be taught a lesson" and discussed blowing up Miller's house. Riggio warned Chambrone that "they are going to come down like a ton of bricks on us * * *. All of us, probably your brother, you, me" (Pet. App. 2520). Chambrone nonetheless stated that he wanted it done and agreed to pay Riggio $4,000 for the job. Pursuant to those instructions, Riggio burned down Miller's house and office on October 5, 1983. Riggio was arrested the next day. Later that morning, a brief collect telephone call was placed from the T.J. Associates office in New York to petitioner's residence in Florida (*id.* at 2521).

2. In instructing the jury on the elements of the substantive extortion counts, the trial court gave the following "conscious avoidance" charge (Pet. App. 2528-2529; Tr. 814-816):

> In determining whether the defendant you are considering acted knowingly and wilfully, you may consider whether that defendant deliberately closed his eyes to what otherwise would have been obvious to him, and that is a consideration of some importance in this case, particularly with regard to [petitioner's] contentions.
>
> It is settled law that a finding of guilty knowledge may not be avoided by a showing that the defendant simply closed his eyes to what was going on about him; "see no evil" is not a maxim in which the criminal defendant should take any comfort.
>
> Guilty knowledge cannot be established by demonstrating mere negligence or even foolishness on the

> part of a defendant. However, it is not necessary, for instance, that the government prove to a certainty that [petitioner] knew that Joseph Riggio, for example, was directly threatening physical injury and violence in demanding that Apple stop doing business with Computer Sciences. You may find [petitioner] had such knowledge if he was aware of a high probability that it was so, unless he actually believed that no threats were being employed by Riggio.
>
> Thus, if you find that the defendant you are considering acted with deliberate disregard of whether threats were used and with a conscious purpose to avoid learning the truth, the requirement of knowledge would be satisfied, unless the defendant actually believed that threats were not used.

3. During the second day of deliberations, juror Rosemarie Stolfa advised the court that she was having a problem with one of the other jurors (Tr. 858-859). The court, in the presence of government and defense counsel, questioned Stolfa about the problem (Tr. 860-864). Stolfa informed the court that another juror had stated during deliberations that the defendants were "part of the mob," that they were guilty, and that she "hated them" and wanted to "crush them" (Tr. 861-862). Stolfa stated that she resented the remarks and that she felt that the juror who made those remarks was prejudiced (Tr. 862-863).

After learning from juror Stolfa that the juror in question was Elizabeth Haney, the court, in counsel's presence, twice questioned Haney about the incident (Tr. 866-869, 872-873). Haney explained that her remarks had not been based on any ethnic bias, but rather on testimony at trial indicating that the defendants were "on the fringes of the Mafioso" and had "connections with other * * * elements * * * in society" (Tr. 869). Haney stated that juror Stolfa had mistakenly taken her remarks as a

personal insult and denied having stated that "we have to convict these people" (Tr. 872).

After the initial questioning of juror Haney, the court stated that her remarks had been prompted by the testimony at trial and that they did not indicate that she was prejudiced or biased (Tr. 870-871). Counsel for co-defendant Chambrone suggested discharging juror Haney (Tr. 874). Petitioner's counsel did not join that motion, but suggested that the court instruct all the jurors that the "Mafia" and the defendants' ethnic background had nothing to do with the case and that the jury should decide the case on the basis of the evidence presented (*ibid.*). The court thereafter explained to juror Stolfa that there apparently had been a misunderstanding and that juror Haney's remarks had not been based on any bias against Italians but rather on certain evidence at trial (Tr. 876). The court then instructed the entire jury along the precise lines suggested by petitioner's counsel and inquired whether any of the jurors felt unable to follow the instructions (Tr. 879-880). None of the jurors expressed an inability to do so.

4. The court of appeals affirmed petitioner's convictions (Pet. App. 2505-2533). The court first held that there was sufficient evidence to support the jury verdict that petitioner had intentionally conspired to commit extortion. In reaching that conclusion, the court pointed to petitioner's control of T.J. Associates, his participation in the nonextortionate parts of the plan to win back CSC's business, the circumstances and content of the critical conversation with Miller, and Riggio's statement to Miller that petitioner had sent him (Pet. App. 2521-2527). The court also concluded that petitioner was properly convicted of the substantive extortion offenses under two distinct theories (*id.* at 2527-2528). First, under *Pinkerton* v. *United States*, 328 U.S. 640 (1946), the court held

that petitioner was liable on the substantive counts, because the attempted extortion offenses were reasonably foreseeable and were committed by petitioner's co-conspirators in furtherance of the conspiracy. Second, the court ruled that petitioner was liable for the substantive offenses under an aiding and abetting theory, because petitioner's meeting with Miller "lent weight and authority to the prior and subsequent threatening conduct and action by Jerry Chambrone and Riggio" (Pet. App. 2528).

The court of appeals also rejected petitioner's challenge to the "conscious avoidance" instruction (Pet. App. 2528-2531). The court found that the instruction had been given only in connection with the substantive counts of attempted extortion, not in connection with the conspiracy count. Accordingly, the instruction did not run afoul of *United States* v. *Mankani*, 738 F.2d 538, 547 & n.1 (2d Cir. 1984), in which the court had held that membership in a conspiracy cannot be proven by conscious avoidance, because the requisite mental state for conspiracy is intent. The court further concluded that the evidence warranted giving the charge, because petitioner's failure to make any inquiry or to take any action after being told of Riggio's threats might well be considered conscious avoidance of knowledge of the threats being made on his behalf (Pet. App. 2531).

Finally, the court of appeals also rejected petitioner's claim of jury impropriety (Pet. App. 2531-2532). Assuming the issue had been preserved even though petitioner made no request to discharge juror Haney or to declare a mistrial, the court held that there was no probability of prejudice from the conduct of juror Haney or the jury as a whole (*id.* at 2532). The court of appeals reasoned that the trial court had properly exercised its discretion in questioning juror Haney and in giving the jury cautionary

instructions. By doing so, the court held, the trial court had ensured that the verdict would not be tainted (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. Petitioner argues first (Pet. 11-17) that his right to a fair trial was abridged when the district court, after learning of juror Haney's alleged bias, refused to discharge Haney from the jury and allowed the trial to proceed. Petitioner contends that the court of appeals' ruling on this claim conflicts with the Eleventh Circuit's decision in *United States* v. *Heller*, 785 F.2d 1524 (1986). That contention does not warrant review.

To begin with, petitioner has not preserved the issue. At no time after the identification or questioning of juror Haney did petitioner's counsel request either a mistrial or the discharge of juror Haney.[2] Although counsel for petitioner's co-defendant suggested discharging juror Haney (Tr. 874), petitioner's counsel recommended instead the very procedure that the trial court ultimately adopted. Having proposed that course of conduct, petitioner cannot now argue that the trial court's actions constituted error. See *United States* v. *Jones*, 763 F.2d 518, 523-524 (2d Cir. 1985), cert. denied, No. 85-643 (Nov. 12, 1985);

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[2] Prior to learning which juror made the remarks complained of by juror Stolfa, petitioner's counsel said that if the juror really was biased "it seems to me that she's gone" (Tr. 865). But that comment was made before counsel heard what the remarks were or whether they evinced bias. After the interviews with juror Haney, petitioner's counsel did not request a mistrial or the discharge of the allegedly tainted juror.

United States v. *Ferguson*, 758 F.2d 843, 851-852 (2d Cir. 1985), cert. denied, No. 84-6967 (Oct. 7, 1985).

On the merits, petitioner's argument rests on a critical mischaracterization of the record. Petitioner twice states in his petition (Pet. 15, 16-17) that, when questioned by the trial court about the incident in question, juror Haney admitted her ethnic bias. As the court of appeals noted (Pet. App. 2531), however, that is not what occurred. Juror Haney did not admit to ethnic bias, and the district court found that her remarks were based on the evidence at trial and not on prejudice against any ethnic group (Tr. 869-871). Thus, the premise of petitioner's argument of juror taint is simply incorrect.

More broadly, the record shows that petitioner was not deprived of a fair trial. The trial court, being in the best position to evaluate the effect on the jury of events at trial, is afforded broad discretion when confronted with allegations of juror misconduct or prejudice. *United States* v. *Gigante*, 729 F.2d 78, 82 (2d Cir.), cert. denied, 467 U.S. 1206 (1984); *United States* v. *Yonn*, 702 F.2d 1341, 1344-1345 (11th Cir.), cert. denied, 464 U.S. 917 (1983); *United States* v. *Barnes*, 604 F.2d 121, 144 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980); cf. *United States* v. *Laymon*, 621 F.2d 1051, 1053 (10th Cir. 1980). For the same reason, the trial court's determination whether a mistrial is warranted is entitled to special weight. *Arizona* v. *Washington*, 434 U.S. 497, 510 (1978). Here, the trial court fully questioned jurors Stolfa and Haney and determined that juror Haney was not laboring under any preconceived notion of petitioner's guilt and did not harbor any ethnic bias against petitioner. Thereafter, at the suggestion of petitioner's counsel, the court carefully instructed the jury that thoughts about the "mob" or the defendant's ethnic background were to play no role in the deliberations and that the verdict was to be based entirely

on the evidence. No juror voiced an inability to comply with those instructions, and it must be presumed that the jury complied with them. *Tennessee* v. *Street*, No. 83-2143 (May 13, 1985), slip op. 5, 7-8; *Francis* v. *Franklin*, No. 83-1590 (Apr. 29, 1985), slip op. 16, n.9; *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341, 367 (1963).[3] In these circumstances, the court of appeals correctly held that the trial court's actions eliminated any question of juror taint.

Finally, the decision of the court of appeals is not in conflict with the Eleventh Circuit's decision in *United States* v. *Heller, supra*. There, several jurors had commented on the testimony during the course of the trial, they had made numerous blatantly anti-Semitic and racial slurs in the presence of the entire jury, they had stated a predisposition to "hang" the Jewish defendant, and one of the jurors had independently consulted an accountant about issues pertaining to the trial and reported the results to the jury. The court of appeals reversed the conviction on three grounds: (1) that the obvious bigotry displayed by the jury denied the defendant a fair trial (785 F.2d at 1527-1528) (bigotry here was "so shocking to the conscience and potentially so damaging to public confidence in the equity of our system of justice, that we must act decisively to correct any possible effects on this appellant"); (2) that several jurors had entertained a presumption of guilt at the beginning of the trial; and (3) that the jury had received extrinsic evidence concerning a material matter in the case (*id.* at 1528).

Nothing similar occurred in petitioner's case. Not only was there no resort to extrinsic evidence, but there was

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[3] The jury's acquittal of petitioner on three counts is also significant. Such a discriminating verdict supports the finding that the jury's decision was based on an examination of the evidence, and not on bias or prejudice. *United States* v. *Gigante*, 729 F.2d at 82.

nothing resembling the pervasive misconduct that tainted the jury in *Heller*. The only conduct alleged to taint the jury deliberations in this case was limited to a single incident involving the remarks of a single juror within the hearing of only one other juror. Most important, however, this case differs critically from *Heller* in that the district court here found that the challenged remarks were not indicative of prejudice at all, but were based on evidence at trial.

2. Petitioner also argues (Pet. 18-23) that the "conscious avoidance" charge to the jury lacked any basis in the evidence and improperly relieved the government of the obligation to prove intent, an essential element of both the conspiracy count and the substantive counts of attempted extortion. The court of appeals properly rejected that contention.

First, the court of appeals did not relieve the government of the obligation to prove that petitioner intentionally joined the conspiracy. That obligation, as the court held in *United States* v. *Mankani*, 738 F.2d at 547 n.1, cannot be met by establishing conscious avoidance, since the requisite mental state for conspiracy is intent, and not mere knowledge. The court of appeals in this case followed its earlier ruling on that point. See Pet. App. 2529 ("Conscious avoidance of participating in a conspiracy and agreeing to be a member of a conspiracy are mutually exclusive concepts"). In this case, the court found (*id.* at 2528-2529) that the conscious avoidance instruction was given only in connection with the substantive counts of attempted extortion, and not in connection with the conspiracy count.[4] Thus, without the aid of a

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[4] As other Second Circuit cases make clear, a conscious avoidance charge may properly be given on a conspiracy count if it is directed only to guilty knowledge of the specific details of the conspiracy and if the court otherwise makes clear that the government must prove that

conscious avoidance charge, petitioner was proved to have intentionally joined the conspiracy to commit extortion.

Second, the conscious avoidance charge was properly given on the substantive counts of the indictment. It is well established that when an essential mental element of a crime is "guilty knowledge," a defendant may not escape responsibility for his actions by deliberately shutting his eyes to avoid learning what otherwise would be obvious. See, *e.g.*, *United States* v. *Jewell*, 532 F.2d 697, 700 (9th Cir.), cert. denied, 426 U.S. 951 (1976); *United States* v. *Guzman*, 754 F.2d 482, 488 (2d Cir. 1985), cert. denied, No. 84-1604 (Jan. 13, 1986).

It is undisputed in this case that guilty knowledge was an essential element of the attempted extortion counts. Moreover, there was an ample evidentiary basis for giving the "conscious avoidance" charge. During petitioner's November 23 conversation with Miller, after being told that Riggio had made threats in petitioner's name, petitioner replied that he "had no idea" about that and that he "[didn't] wanna' know about it, I don't care to know about it." Following the November 23 conversation, petitioner never contacted Riggio either to ask what he had said to Miller or to stop him from making further threats in petitioner's name and on behalf of petitioner's business. The court of appeals thus correctly concluded that the evidence permitted the inference that petitioner, who

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the defendant willfully participated in the conspiracy with the specific intent to further its criminal objective. See, *e.g.*, *United States* v. *Guzman*, 754 F.2d 482, 488 (1985) ("After—and only after—reiterating the government's burden of proof * * * [as to willful participation in the conspiracy with specific intent to further its criminal objective], the district court correctly instructed the jury [on conscious avoidance] as to a quite distinct matter—the knowledge of individual defendants with regard to the specific details of the conspiracy's operation."); *United States* v. *Mohabir*, 624 F.2d 1140, 1154 (1980).

willfully participated in the overall plan to force Miller to relinquish the delivery routes formerly held by T.J. Associates, was aware of the high probability that threats had been made to Miller, yet deliberately avoided knowing all the details of those threats.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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